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CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

CENTRAL VALLEY REGION

In the matter of:

DRAFT CLEANUP AND ABATEMENT ORDER

THE WIDE AWAKE MERCURY MINE

COLUSA COUNTY

COMMENTS ON DRAFT CLEANUP AND ABATEMENT ORDER SUBMITTED BY THE EMMA G. TREBILCOT TRUST

INTRODUCTION

This law firm represents Wells Fargo Bank, N.A., the trustee for the Emma G. Trebilcot Trust. We appreciate the opportunity to provide arguments and evidence regarding the proposed Cleanup and Abatement Order ("CAO") for the former Wide Awake Mine, located in Colusa County, California.

We strongly dispute, however, that the CAO is valid or warranted against the Trust. Contrary to the Prosecution Team's (hereinafter, "Prosecution") statement, the Trust did not hold title to the former mine from 1977 to 1990. The Trust in fact owned the property (hereinafter, the "Property") for less than two years, from March 1988 to December 1989. The Trust received the Property involuntarily by court order, as part of a much larger tract, and immediately put it up for

sale. During the brief period of the Trust's ownership, the trustee did not occupy the Property and did nothing to exacerbate any preexisting conditions, but, rather, worked to sell the Property from afar. Moreover, during this period, the Trust's ability to control the Property was very limited due to a preexisting lease conferring upon Homestake Mining Company the "exclusive possession" of the former mining site.

More importantly, Wells Fargo, as trustee, has at all times managed the Trust for the benefit of four charities that would be financially damaged by the CAO: the Shriners Hospital for Crippled Children, Salvation Army, San Francisco Lighthouse for the Blind & Visually Impaired, and Lion's Eye Foundation. None of the charities have had any direct ownership in the Property or possessed any actual control, and like Wells Fargo they did not know of any discharges and did nothing to exacerbate any preexisting pollution. The CAO would, nonetheless, directly affect the monies held in trust for these charities. This is a patently inequitable result. The Trust funds have been held for more than 20 years. The beneficiaries have, quite reasonably, come to rely on the expectation that these funds will remain available for charitable purposes in the future, and not be siphoned by the actions of the Regional Board to clean up a century-old mine that they had nothing to do with. Neither Wells Fargo nor the charities are insured in any way to prevent this result.

The State Water Resources Control Board ("State Board") has held that equitable factors may warrant releasing an innocent former owner of polluted property from liability under Porter Cologne. We believe this case presents a compelling use of this doctrine. This is based on the short period of the Trust' ownership, on the lack of evidence that the Trust or its beneficiaries were aware of any discharges or did anything to exacerbate preexisting conditions, on the lack of control over the Proprty by the Trust, and on the fact that the CAO would take directly from charities that rely on these funds. To these factors, we add that the Prosecution has not carried its burden of showing that an illegal discharge of mercury occurred during the Trust's ownership.

We ask, accordingly, that the Regional Board remove the Trust from the CAO.

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FACTUAL BACKGROUND

The Wide Awake Mine

The Wide Awake Mine is a former mercury mine located in Colusa County, about one mile southwest of the Wilbur Springs resort and 26 miles southwest of the town of Williams. The Wide Awake Mine was initially built in the 1870s, and it was then that most of the mercury output took place. Mining ceased before 1901, and a limited amount of mining or processing is reported to have briefly resumed in the 1930s and 1940s. These activities had been abandoned for decades before the Trust gained ownership of the Property.

The Wide Awake Mine is part of the Sulphur Creek watershed, an area that is characterized by numerous inactive mercury and gold mines. The Wide Awake Mine is located next to an unnamed drainage which enters Suphur Creek about one-third to one-half mile to the north. Downstream from this confluence, Sulphur Creek intersects with Bear Creek after about one and a half miles. Bear Creek intersects with Cache Creek nine miles downstream, which, in turn, drains to the Sacramento River (due to diversions Cache Creek flows reach the Sacramento River only in wet years).

Sulphur Creek is considered "impaired" for mercury due to natural conditions, and exhibits this condition independent of any anthropogenic sources. The Regional Board's staff acknowledged this in a March 2007 staff report concerning a proposed Basin Plan amendment for Sulphur Creek: "Sulphur Creek has never supported [municipal and domestic supply beneficial uses] due to naturally occurring conditions that prevent them from being attained." (Appendix A, at 3.)

The Trust

The Trust is a "testamentary" trust, meaning that it was created through the implementation of a will. The Trust was created at the direction of Emma G. Trebilcot's will after she died on December 22, 1986. Ms. Trebilcot had previously acquired the former mine as a part of a much larger tract of land willed to her in April 1977 upon Ruth B. Gibson's death (Appendix B, probate court order). Ms. Trebilcot received the Property in undivided shares with F.B. Smith, who later transferred his share to Ms. Trebilcot in August 1978 (Appendix C, deed), making Ms.

Trebilcot the sole owner from then until her death.

After Ms. Trebilcot's death, the probate court issued a March 28, 1988 order (Appendix D) placing the Property in trust according to Ms. Trebilcot's will. This order marks the establishment of the Trust and the beginning of the Trust's ownership of the Property.

Ms. Trebilcot's will stated that the Trust was to be established for the benefit of four charities: Shriners Hospital for Crippled Children, the Salvation Army, San Francisco Lighthouse for the Blind & Visually Impaired, and the Lion's Eye Foundation. Wells Fargo was appointed the trustee. The Trust assets, then and at all times since, have been held by Wells Fargo for the benefit of these four charities.

Wells Fargo worked to sell the Property immediately after the Trust was established. On May 19, 1988, less than two months after the Property was received in trust, Wells Fargo entered into a listing agreement with a realty company to sell the Property (Appendix E, letter). The Trust sold the Property less than two years later, in December 1989, to Goshute Corporation (Appendix F).

The Trust did not develop or improve the Property during its ownership, or conduct or authorize activities that could have exacerbated any pre-existing pollution.[1] The Trust merely held the Property pending its eventual sale. The charities, likewise, never exercised ownership or control of the Property, or authorized any activities on the Property at any time. Each charity will, however, be financially affected if the CAO is adopted as proposed. The CAO would require the Trust to spend the Trust corpus towards mine cleanup and monitoring – activities that, according to the record, may cost over a million dollars – causing the loss of this income to the charities and the people that rely on them. Each charity has sent a letter to the Regional Board objecting to the CAO, attached under Appendix G for reference, and their representatives are expected to participate at the hearing.

The Trust's use of the Property also was restricted during its short ownership due to a preexisting lease to Homestake Mining Company ("Homestake"). The lease (Appendix H) was

[1] The Trust has retained certain subsurface rights (i.e., mineral, oil and gas, and geothermal rights) in the Property, but this does not give the Trust the right to use the surface of the Property, and in any event, these rights have not been exercised at any time.

entered in August 1978, well before the Trust took ownership; like its ownership of the Property, the Trust assumed this lease obligation as a result of the March 1988 court order. The lease provided Homestake with exclusive possession of the Property for mining. The lease provided, in pertinent part:

> 3. Exclusive Possession. During the lease term Homestake shall have quiet enjoyment and exclusive possession for mining purposes of all of the Mining Property, reserving to Owner the use of the surface for livestock grazing and other agricultural uses and water development incidental to such uses so long as such uses do not unreasonably interfere with the mining uses of Homestake.

As the Prosecution has already noted, this lease covered the Wide Awake Mine site.

There is no insurance available to reimburse the Trust or the charitable beneficiaries for monies that would be lost as a result of the CAO. The impacts of the loss of all or any part of the Trust corpus will be felt directly and solely by the charities, which have no way to spread these costs or pass them to another. Representatives of the charities intend to appear at the hearing to discuss these impacts in more detail.

In the time since the Trust sold the Property, the Property has been transferred on several occasions, all detailed in the record. None of the transactions involved the Trust or its charitable beneficiaries.

ARGUMENT

A. The Trust's potential liability covers a much shorter period than alleged

The Trust did not own the Property for as long as the Prosecution represents. The Prosecution's Statement of Evidence[2], under the heading "Ability to Control," states: "Emma G. Trebilcot and the Emma G. Trebilcot Trust owned the Wide Awake Mine between April 18, 1977 to February 28, 1990..." This is factually incorrect. The Trust did not receive the Property (or for that matter did the Trust come into existence) until the March 28, 1988 probate court order which settled Ms. Trebilcot's estate.

[2] We refer to the evidentiary statement submitted by the Prosecution in this matter with respect to the Trust. The document is undated and has no page numbers.

And to be clear, the Trust is not responsible for liability incurred by Ms. Trebilcot during her life. A testamentary trust that receives property through probate takes it free of the decedent's debts and liabilities whether "due, not due, or contingent, and whether liquidated or unliquidated." (Prob. Code, § 9000, subd. (a).) This basic function of the Probate Code operates to discharge all claims against an estate that arose during the decedent's lifetime, unless such claims are resolved during probate proceedings. (Prob. Code, § 9002 ["claim that is not filed as provided in this part is barred"].) The "claims bar" is triggered by the giving of notice to actual and potential creditors through publication and other means. (Prob. Code, § 9001.) These requirements were followed during the probate proceedings for Ms. Trebilcot's estate. Attached as Appendix I are the relevant portions of the probate court's files, showing that notice was given as required by law. Hence, the claims bar applies.

Consequently, the Trust's liability under the CAO, if any, can exist only with respect for the period of its independent ownership of the Property from March 1988 to December 1989.

B. The Trust should be dismissed under *Wenwest.*

In *Wenwest et al.*, Order No. WQ 92-13, the State Board recognized that its cleanup and abatement authority under Water Code section 13304 may be trumped by equitable factors where the potential discharger is an interim owner of property. There, the State Board determined that Wendy's International was not responsible for cleaning up land affected by pollution that predated Wendy's ownership. Wendy's had acquired land that included a leaky underground storage tank. The acquisition was made, however, not to develop the land but for the purpose of selling the land to a franchisee. Wendy's owned the property for four months, did not know the full scope of the pollution, and did nothing to exacerbate it. In these circumstances, the State Board held that a water-quality enforcement action against Wendy's was unwarranted.

The State Board listed several factors that it relied on to release Wendy's from cleanup liability. For comparison, we have listed the factors verbatim from *Wenwest* within the left-hand column below, and the comparable factors relative to the Trust on the right. This chart shows that each of the equitable factors considered in *Wenwest* are matched by the same or similar equitable factors here.

Wenwest factors	Trebilcot Trust factors
Wendy's purchased the site specifically for the purpose of conveying it to a franchisee.	Factor is present - the Trust's ownership was purely involuntary, and the Trust immediately placed the Property for sale.
Wendy's owned the site for a very brief time.	Factor is present - the Trust acquired the Property in March 1988, placed it for sale less than two months later, and sold in December 1989.
The franchisee who bought the property from Wendy's is named in the order.	Factor is present - all past and existing owners are named in the CAO.
Wendy's had nothing to do with the activity that caused the leaks. (In previous orders in which we have upheld naming prior owners, they have been involved in the activity which created the pollution problem.)	Factor is present - the Trust never mined the site, or exacerbate the spread of pollutants.
Wendy's never engaged in any cleanup or other activity on the site which may have exacerbated the problem.	Factor is present - the Trust never engaged in any activity that could have exacerbated preexisting conditions.
While Wendy's had some knowledge of a pollution problem at the site, the focus at the time was on a single spill, not an on-going leak.	Factor is present - the Trust did not know of the nature or extent of any pollution.
Wendy's purchased the site in 1984 at a time when leaking underground tanks were just being recognized as a general problem and before most of the underground tank legislation was enacted.	Factor is present – there is no evidence that data regarding the potential discharges from the former mine was developed when the Trust owned the Property.
There are several responsible parties who are properly named in the order.	Factor is present - there are numerous other parties named in the CAO.
The cleanup is proceeding.	Factor is present - the Regional Board has initiated a broad enforcement strategy and the cleanup will proceed in the Trust's absence.

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Because *Wenwest* turned on equitable factors, the impact of the CAO on the Trust's beneficiaries can and should also be considered. The Trust's assets are currently managed for the benefit of Shriners Hospital for Crippled Children, the Salvation Army, San Francisco Lighthouse for the Blind & Visually Impaired, and Lion's Eye Foundation. For the nearly 20 years since the Trust sold the property, these charities have budgeted with an expectation that the Trust assets will be available for charitable goals. The CAO would disrupt such expectations by taking the Trust's funds for remediation, despite their complete lack of culpability, and despite that other dischargers remain to satisfy the CAO. This is a highly inequitable result and makes this a more compelling use of the *Wenwest* doctrine than even the facts in *Wenwest* allowed.

C. The State Board's test for former landowner liability has not been met

The Prosecution also has not, as a purely legal matter, established the Trust's liability. The Prosecution appears to incorrectly assume that simply because the Trust owned the Property, for however short a time, the Trust must be imputed both knowledge of pollution on the Property and the ability to control it. The State Board, however, has never held that a former landowner is automatically liable for ongoing discharges outside of the landowner's knowledge.

Rather, the State Board applies a three-part test for determining whether former landowners should be liable for a discharge: (1) whether they had a significant ownership interest in the property at the time of the discharge; (2) whether they had knowledge of the activities that resulted in the discharge; and (3) whether they had the legal ability to prevent the discharge. (See *Wenwest et al.*, Order No. WQ 92-13, *Stuart Petroleum*, Order No. WQ 86-15.) As follows, none of these parts has been established against the Trust.

1. Ownership interest at the time of the discharge

First, the Prosecution has failed to demonstrate, with any reasonable or competent evidence, that a discharge of mercury occurred between March 1988 to December 1989, when the Trust owned the Property. Without such evidence, the Regional Board lacks a basis to exercise its cleanup authority against the Trust.

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This conclusion is revealed clearly through a careful review of the "5C2 Report"[3] (Appendix J). The 5C2 Report is the only evidence the Prosecution has relied upon to establish a discharge by the Trust. The function of the 5C2 Report is to inventory the site conditions existing at the time that the report was prepared, in 2003. The 5C2 Report does not, however, include any attempt to quantify the amount of mercury leaching from the former Wide Awake Mine into to the watershed at any point in time. The authors were not concerned with this question and simply did not undertake that analysis.

While the 5C2 Report did refer to a study by Churchill and Clinkenbeard which did attempt such an estimate (the 0.02-0.44 kg/yr estimate that underlies the CAO), the authors of the 5C2 Report also discounted this as an "overestimate" resulting from improper testing. (Appendix J, at 3-15 [emphasis added].) Moreover, the 5C2 Report authors indicated that the mechanism for mercury transport into the watershed was poorly understood. They observed that mercury samples had a low transport potential (see Appendix J, at 3-46 ["The potential for water-rock interaction to mobilize mercury from tailings is thought to be minimal…"]), and that there was a lack of visible evidence supporting the 8 ton/yr estimate of sediment transport from the mine (Appendix J, at 3-46 ["Evidence for significant erosion by runoff from these cuts such as incised channels, rills, or sediment aprons were not observed."])

These gaps and uncertainties within the 5C2 Report leave this fundamental question unanswered: How much mercury was discharged from the Wide Awake Mine site to the Sulphur Creek watershed between March 1988 and December 1989, when the Trust owned the Property? The 5C2 Report simply provides no answer to this question, and consequently, the CAO against the Trust cannot be sustained.

The Prosecution may respond that it does not need to demonstrate precisely how much mercury was delivered into the watershed, so long as the Regional Board is comfortable that *some* quantity of mercury made its way out of the former mine site during the Trust's ownership. This, however, ignores the applicable standard of proof. Enforcement must be predicated on "credible and reasonable" evidence that a person is responsible for a discharge of pollutants: "[T]here must

[3] Formally titled "CalFed – Cache Creek Study" dated September 2003.

be a reasonable basis on which to name each party. There must be substantial evidence to support a finding of responsibility for each party named. This means credible and reasonable evidence which indicates the named party has responsibility." (*Order No. WQ 85-7 (Exxon, Co., U.S.A.).*) The Regional Board (here, the Prosecution) has this burden of proof. (See *Beck Development Co., Inc. v. Department of Toxic Substances Control* (1996) 44 Cal.App.4th 1160, 1205-1206.) When no analysis has been attempted to calculate the amount of mercury discharged from the site during the Trust's ownership, we submit that no credible and reasonable evidence of a discharge has been proferred to this body to establish its cleanup authority against the Trust.

Indeed, lacking such evidence in the record, the Prosecution cannot meet the essential requirements of Water Code section 13304. Liability under Section 13304, subdivision (a), is not predicated on a "one molecule" of pollution rule. Rather, liability exists only when a discharge of pollutants creates an exceedance of the applicable limits of the pollutant as defined by State Board or Regional Board orders, or under prevailing nuisance laws:

> Any person who has discharged or discharges waste into the waters of this state **in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board**, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state **and creates, or threatens to create, a condition of pollution or nuisance**, shall upon order of the regional board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts.

(Water Code, § 13304, subd. (a) [emphasis added].) Consequently, the Trust's liability requires the Prosecution to establish the existence of a discharge, during the Trust's period of ownership, that exceeded the regulatory requirements which applied at that time. The record, however, does not include any evidence of the water-quality objectives, if any, that existed during the period of the Trust's ownership. Indeed, the only evidence of numeric objectives that have been introduced by the Prosecution are those that currently are in effect, but as with most government regulations, such standards are not retroactive unless given specific legislative intent. (*Beck Development Co., Inc. v. Department of Toxic Substances Control* (1996) 44 Cal.App.4th 1160, 1207; *Evangelatos*

v. Superior Court (1988) 44 Cal.3d 1188, 1207; *Blumenfeld v. San Francisco Bay Conservation Comm.* (1974) 43 Cal.App.3d 50, 59.)

In fact, it appears the Regional Board did not adopt numeric objectives for mercury applicable to Sulphur Creek until very recently. In October 2005, the Regional Board adopted numeric water-quality objectives for mercury for the Cache Creek watershed, which includes Sulphur Creek. (Appendix K.) Thus, there is no evidence in the record of any specific water-quality objectives for mercury in place during the Trust's ownership. Consequently, the record cannot support a finding that a discharge took place during the Trust's brief ownership at levels that violated any applicable requirements to trigger Water Code section 13304.

Finally, the Prosecution has not established that any mercury contributions to the watershed from the Wide Awake Mine between March 1988 and December 1989 constituted a nuisance. In the water quality setting, a nuisance can be established as a violation of a particular water-quality standard (nuisance per se), or through a consideration and balancing of factors such as the extent to which a discharge interfered with the use of property, or the number of people that were affected. (*Beck Development Co., Inc. v. Department of Toxic Substances Control* (1996) 44 Cal.App.4th 1160, 1207 [citation omitted]; Water Code, § 13305, subd. (m).) The Prosecution has not established a nuisance per se because, as noted above, it has not established a violation of any specific water-quality standard against the Trust. The Prosecution also has failed to establish any nuisance based on a "balancing of factors" approach because the Prosecution has not attempted to introduce evidence regarding the effect of discharges during the Trust's ownership on nearby uses of property, or the number of people affected, and to what degree, etc.

Indeed, the rather apparent reality is that any possible mercury discharge during the Trust's short ownership would have been extremely minor and took place against "background" mercury from natural sources. Given this setting, the record does not begin to support a finding that the Trust caused or contributed to a nuisance.

2. Knowledge of the cause of the discharge

The second part of the test is whether the former landowner had knowledge of the activities that resulted in a discharge. The State Board holds that liability may result if a property

owner "permits" a discharge to occur *provided that* the person had awareness of the condition that gave rise to the discharge, i.e. "knew or should have known" of the discharge. (*San Diego Unified Port District*, Order No. WQ 89-12; *United States Department of Agriculture, Forest Service*, Order No. WQ 87-5; *Stuart Petroleum*, Order No. WQ 86-15.) The Prosecution has not submitted any evidence, however, that the Trust "knew or should have known" that the former mine site was slowly discharging mercury to the watershed. When the Trust received the Property, the mine had been closed and inactive for many decades. There is nothing apparent in the condition of the land that would lead an average person to suspect that discharges were occurring, or that the Trust – or anyone else – knew of the discharges. Indeed, it appears that even the Regional Board's staff was not aware of the potential discharges, considering that the 5C2 Report, the centerpiece of the CAO against the Trust, is dated 2003. Additionally, the fact that a former mine site was on the Property is not sufficient to establish that the Trust should have known of a potential problem. The vicinity is characterized by many similar inactive mines, and in fact, this site would not pose a problem if not for the additional fact of the tailings piles.

In summary, the record is absent of evidence that the trustee or beneficiaries had any specific knowledge of discharges. The record also lacks evidence showing that it was a matter of such general knowledge that a former mine might have been a continuing source of mercury that the Trust should have known of it. The Prosecution has, in fact, provided no evidence whatsoever on these points.

3. Legal ability to prevent the discharge

The third, and final, element of the State Board's test is whether a person had the legal ability to control the discharge. On this the Homestake lease is determinative. The lease provided Homestake with "exclusive possession" of the Property, including the Wide Awake Mine site, for mining purposes. In effect, the former landowner ceded possession of the Property to Homestake during the period the lease was in force, and the Trust remained bound to the lease's requirements during its ownership. Because the Property was in the possession of another, the Trust lacked the legal ability to control the discharge.

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The Prosecution may suggest that a carve-out provision in the lease (see Paragraph 3, allowing restricted grazing and agriculture) retained, for the Trust, sufficient control over the Property to perform the remedial work proposed in the Statement of Evidence (under "Ability to Control"). It is pure fiction, however, to assume, that the Homestake lease would have permitted the remedial activities the Prosecution suggests (i.e., relocating material piles, redirecting runoff, recontouring the land, and stabilizing the stream banks). The Prosecution suggests that the Trust could have entered the leased premises, retaken possession of prior mining areas, and undertaken significant earthmoving, consistent with a lease that affords exclusive possession of the premises to Homestake. We believe the far more realistic view is that, had the Trust made such a proposal during its ownership, Homestake would have steadfastly refused, and at the very least, the Trust's legal ability to prevail would have been uncertain.

D. The CAO exceeds the Regional Board's authority by attempting to make the Trust responsible for the entire cleanup, rather than its proportionate share.

The CAO is premised on the Prosecution's theory that each discharger is jointly and severally liable for the cleanup, regardless of each party's proportional liability. The CAO would, in other words, make the Trust responsible for the entire cleanup regardless of the Trust's actual contribution. This logic strains logic and credulity; it is patently unreasonable to suggest that the Trust is responsible for the entire mine waste cleanup, costing millions, merely because the Trust might be attributed a small part of it.

We have reviewed this theory against state law, and found that joint and several liability against dischargers is not supported either by the language of Porter-Cologne or basic California legal principles.

The pertinent Porter-Cologne language is in Water Code section 13304. That section provides that "[a]ny person" who has discharged waste in violation of law "shall upon order of the regional board, clean up the waste or abate the effects of the waste..." (Water Code, § 13304, subd. (a) [emphasis added].) By specifying that liability applies only with respect to "the" waste discharged, a literal reading of section 13304 limits the Regional Board to imposing liability only for the discharges attributable to a particular discharger. This interpretation of section 13304 has

been recognized by commentators. (Manaster & Selmi, California Environmental Law and Land Use Practice (Mathew Bender) Ch. 32, § 32.34.)

This fairer view of liability also follows longstanding California law, which holds that multiple tortfeasors are liable only for their individual contributions to a nuisance. (See 5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 50, p. 118.) As an example, in *Griffith v. Kerrigan* (1952) 109 Cal.App.2d 637, the owner of a peach orchard sued the owner of an adjoining rice field and the owner of a nearby canal. The plaintiff alleged that the flooding of the rice fields, and leaks in the canal, both served to raise the ground water table on plaintiff's property and damage crops. The court rejected plaintiff's claim that each defendant was severally liable for all damages, citing the rule that "each is liable only for such proportion of the harm caused to the land or of the loss of enjoyment of it by the owner as his contribution to the harm bears to the total harm." (*Id.*, at 639; see also *Carlotto, Ltd. v. County of Ventura* (1975) 47 Cal.App.3d 931 [requiring apportionment of damages from flooding and siltation of plaintiff's property]; *California Orange Co. v. Riverside Portland Cement Co.* (1920) 50 Cal.App. 522 [where two cement plants were responsible for depositing cement dust on plaintiff's orchards, each was liable only for its proportion of the total damages caused by dust from the respective plants]; *Connor v. Grosso* (1953) 41 Cal.2d 229 [various persons dumped dirt on plaintiff's property; where one did not act in concert with others, he is not liable for the removal of others' dirt].)

Thus, under either section 13304 or established state law, the Trust cannot be held responsible for the entire Wide Awake Mine cleanup. Some mechanism of apportionment must be included within the CAO to render it consistent with Porter-Cologne and state law generally. Absent such provisions, the CAO is legally defective and should not be finalized.

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CONCLUSION

In summary, we believe the facts clearly and forcefully show that the Trust is not a proper party, and accordingly, we ask that the Regional Board release the Trust from the CAO. On behalf of Wells Fargo and the beneficiaries, we appreciate the opportunity to provide the Regional Board with this submittal, and look forward to the October hearing on this matter.

Dated: September 16, 2009

DIEPENBROCK HARRISON
A Professional Corporation

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